



RECEIVED

APR 20 2009

COMMUNITY
DEVELOPMENT

Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045

Charles E. Maduell
206.757.8093 tel
206.757.7093 fax

chuckmaduell@dwt.com

April 20, 2009

Tukwila City Council
City of Tukwila
6200 Southcenter Blvd.
Tukwila, WA 98188

EXHIBIT 7
DATE 4-20-09
PROJECT NAME
FILE NO
Council Review SMP
Update L06-088

Re: April 20, 2009 Public Hearing--Comments on Shoreline Master Program Update

Dear City Council Members:

We represent Yellow Transportation, Inc. ("Yellow Transportation"), a subsidiary of YRC Worldwide Inc., which owns and operates a national freight distribution center on the Green/Duwamish River at 12855 48th Avenue South, in the City of Tukwila. We are writing to provide comments on the proposed Shoreline Master Program Update ("SMP Update").

Yellow Transportation is the largest subsidiary of YRC Worldwide, and provides regional, national and international transportation and related services to approximately 400,000 customers. The Tukwila facility is a 73,413 square foot freight distribution center which also contains 12,428 square feet of office space and 128 loading docks on 12.80 acres. In addition to servicing the Seattle market, the Tukwila facility also serves as a northwestern origination point for the more than 250 facilities in Yellow Transportation's network throughout the country. In terms of square footage and loading docks, Yellow Transportation's Tukwila facility is the largest facility that YRC Worldwide operates in the State of Washington. There are currently 164 employees at this site. Yellow Transportation has used the Tukwila facility as a freight distribution center continuously since 1983.

As is evident from the attached aerial photograph and map, a substantial portion of the Yellow Transportation property is within the City's shoreline jurisdiction and will be subject to and substantially affected by the proposed SMP Update under consideration by the City Council.

During the Planning Commission's review of the staff-proposed SMP Update, Yellow Transportation submitted written comments and testified at Planning Commission hearings about

DWT 12746645v1 0088183-000001

Anchorage
Bellevue
Los Angeles

New York
Portland
San Francisco

Seattle
Shanghai
Washington, D.C.

100% ④

www.dwt.com

its concerns with the proposed SMP Update. While some of Yellow Transportation's concerns have been addressed in the February 5, 2009 Planning Commission Recommended Draft SMP, a number of substantial concerns remain. They are addressed below by relevant subject matter.

River Buffer

1. River Buffer

Yellow Transportation remains concerned about the proposed increase in the buffer for its Tukwila freight distribution facility property from 50 feet to 100 feet. The buffer is also a setback, within which no uses or development relating to Yellow Transportation's Tukwila facility would be permitted. Further, it would cause some of the current uses and improvements on the property to become nonconforming.

The SMP Update does not provide any justification for or relief from this substantial expansion of the buffer. The Yellow Transportation property is zoned and developed for commercial, light industrial uses. For properties such as this, there is no demonstrable need or basis for imposing a 100-foot buffer where, as here, the existing 50-foot vegetated buffer adequately protects shoreline functions and values. Nor is there even any need or basis for treating the Yellow Transportation property different than nearby residential properties, for which a 50-foot buffer is imposed by the SMP Update.

Like the buffers imposed for the similarly situated residential properties along the river, a 50-foot buffer is more than sufficient to ensure no net loss of shoreline functions and values and should be the maximum buffer imposed on the Yellow Transportation property. If any wider buffers are imposed, the SMP should at least allow Yellow Transportation to obtain a reduction in the buffer upon a showing that the reduction would not adversely affect shoreline functions and values. Such an approach is consistent with the SMP goal of ensuring no net loss of shoreline functions and values.

The SMP Update would not only double the size of the existing river buffer on the Yellow Transportation property to 100 feet, it also would not provide any practical relief from this buffer. While the proposed SMP Update allows the buffer to be reduced by up to 50% if the property owner reslopes the bank to 2.5:1, provides a 20-foot setback from the top of the new slope, and vegetates both the river bank and the 20-foot setback area in accordance with the vegetation and landscape requirements in the SMP, nothing close to such a reduction on the Yellow Transportation project can likely be achieved since the 100-foot buffer width in the SMP Update was established in the first place to allow enough room to reconfigure the riverbank to achieve the 2.5:1 slope. If anything, the buffer reduction criteria in the SMP Update suggest that the buffer width was established for flood control purposes, not to protect shoreline functions and values as required by the Shoreline Management Act.

A better approach for buffer reduction is the one provided for in the City's sensitive areas ordinance, Chapter 18.45, for comparable watercourses, which would provide the needed flexibility in buffer width based on the specific characteristics of a site to address the shoreline protection provided by a buffer, instead of the one-size-fits-all approach in the proposed SMP Update. At the Planning Commission proceedings, Yellow Transportation proposed such an alternative to the buffer reduction criteria in the staff-proposed SMP Update, one that would essentially mirror the provisions in section 18.45.100(F) of the sensitive areas ordinance for variation of standard watercourse buffer widths. If adopted in the SMP Update, it would result in consistent and comparable treatment of similar watercourses (Types 1 and 2), each with 100-foot buffers, and each able to have their buffers reduced up to 50% provided the standards for buffer reduction in TMC 18.45.100(F) are met.

Yellow Transportation reiterates this proposed approach for buffer reduction, should the City Council approve the currently-proposed 100-foot buffer. Still, such a substantial increase to the current 50-foot buffer on the Yellow Transportation property should not be adopted by the City Council because it is neither justifiable nor reasonable on properties such as Yellow Transportation's that are zoned and developed for commercial, industrial uses. It would also make the current use of the property nonconforming, a status that is not favored under Washington law and which can have a significant adverse effect on property values, redevelopment potential, and the ability to obtain credit and insurance, among other effects – a circumstance especially troubling in this current economic climate.

2. Vegetation Protection and Landscaping

The SMP Update requires installation and maintenance of substantial, expensive revegetation and landscaping, both within and outside of the river buffer. SMP, §9.10. It does so without any consideration of the need for such requirements based on the impacts of development, or whether such required improvements are roughly proportional or reasonably necessary as a direct result of the project impacts. As a result, imposition of such requirements on certain development activities could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020. *See, e.g., Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 761, 49 P.3d 867 (2002) (“development conditions must be tied to a *specific, identified impact* of a development on the community.”); RCW 82.02.020 (Exaction is unlawful tax or fee unless City meets burden of establishing that development conditions are reasonably necessary as a direct result of the proposed development); *Citizens' Alliance for Property Rights v. Sims*, 145 Wn.App. 649, 187 P.3d 786 (2008) (King County's clearing limits in critical areas ordinance violate RCW 82.02.020 because not proportionally related to proposed development); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 677 (1987) (City must show “essential nexus” between required condition and impact of development); *Dolan v. City of Tigard*, 512 U.S. 374, 386-94, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994) (City must make individualized determination the required condition is “roughly

proportional" to the impacts of the proposed development). Further, they purport to impose development conditions to "relieve a preexisting deficiency," which is clearly unlawful. *Benchmark Land Co. v. City of Battleground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002).

To address these concerns, the City should revise Section 9.10 to ensure that any vegetation protection and landscaping requirements imposed on development are proportional to the impacts of such development, as required by RCW 82.02.020 and state and federal constitutional law.

3. Nonconforming ("Pre-Existing") Development

Section 14.6 address many of the concerns raised by Yellow Transportation during the Planning Commission proceedings, especially those relating to reconstruction and replacement of nonconforming ("pre-existing") structures that are nonconforming simply because they will now be located within the substantially wider, no-activity buffer established by the SMP Update. One critical concern remains however: the loss of a property's nonconforming use status where a pre-existing use of a structure is changed to another use, even if the new use is permitted by the underlying zone. There is no defensible basis to cause a property that is nonconforming by virtue of having an existing structure wholly or partially within the shoreline buffer to lose its nonconforming status simply because the pre-existing use of a structure changes to a use permitted by the underlying zoning of the property. The language in Section 14.6(A)(4) should be amended to allow a change of use from one nonconforming use to another for a structure wholly or partially within the shoreline buffer, so long as the use is permitted by the underlying zoning for the property.

4. Public Access

Like the vegetation protection and landscaping requirements, the public access requirements in Section 11 of the SMP Update require extensive and expensive public access improvements for relatively minor development or redevelopment. The extent of the public access improvements that must be installed and dedicated do not vary based on the need for such requirements to mitigate the impacts to public access from development, or whether such required improvements are roughly proportional to or reasonably necessary as a direct result of the project impacts. Thus, imposition of such requirements on certain development activities could constitute an unconstitutional taking under state and federal constitutions and violate RCW 82.02.020.

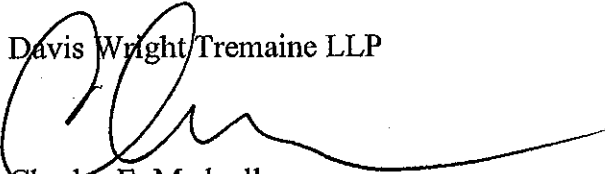
To address these concerns, Section 11 of the SMP Update should be revised to ensure that any public access requirements imposed on development are reasonably necessary as a direct result of, and roughly proportional to, the impacts of such development on public access, as required by RCW 82.02.020 and federal and state constitutional requirements. See cases cited in Section 2, above.

Tukwila City Council
April 20, 2009
Page 5

Thank you for your consideration of these comments.

Very truly yours,

Davis Wright Tremaine LLP



Charles E. Maduell

cc: Brad Schroeder, Vice President, Finance & Properties, YRC Worldwide Inc.
Joseph J. Pec, Esq., Enterprise Transportation & Shared Services Counsel,
YRC Worldwide Inc.

Enclosure



OHWM Buffer (Section 5)

